(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: FEB 1 0 2015 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an IT Solutions Provider. It seeks to employ the beneficiary permanently in the United States as a "Sr. Information Systems Security Engineer." As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wages of its other sponsored workers beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

As set forth in the director's August 5, 2013 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wages of its other sponsored workers as of the priority date.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on August 17, 2011. The proffered wage as stated on the ETA Form 9089 is [redacted] per year.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in [redacted] and to currently employ [redacted] workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the beneficiary's proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). The petitioner must also establish that it has had the continuing ability to pay the combined proffered wages to each sponsored worker from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

In determining the petitioner's ability to pay the proffered wage during a given period, United States Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2011 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co.*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See also Taco Especial*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River St. Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F. Supp. at 537 (emphasis added).

USCIS records indicate that the petitioner has filed at least employment-based petitions, including non-immigrant petitions and immigrant petitions.[2] Where a petitioner files I-140 petitions for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation.

The record before the director closed on July 22, 2013 with the receipt by the director of the petitioner's submissions in response to the director's Notice of Intent to Deny (NOID). As of that date, the petitioner's 2013 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2012 was the most recent return available. The petitioner may demonstrate its

[2] These numbers of Form I-140 filings do not include the two Form I-140 petitions filed on behalf of the instant beneficiary.

ability to pay the necessary proffered wages through an examination of the net income figure reflected on the petitioner's federal income tax return.[3] As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns demonstrate its net income and net current assets for 2011 and 2012, as shown in the table below.

Year	Net Income	Net Current Assets
2011	[redacted]	
2012		

In response to the director's NOID, the petitioner submitted a table of [redacted] sponsored workers showing the proffered wages and wages paid to each worker for 2011, including details about the validity of the Form I-140 petitions and whether any were withdrawn. The director concluded that the combined proffered wages of all the beneficiaries with pending or approved petitions with priority dates prior to December 2011 was [redacted] and that the petitioner demonstrated that it paid wages of [redacted] in 2011, leaving a balance of [redacted] in wages owed.

Based on evidence submitted on appeal, we have analyzed the table containing wages paid to the sponsored workers in 2011, and we determine that the proffered wages of all sponsored workers for

[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2011-2012) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed February 5, 2015) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income for 2011 and additional deductions for 2012, shown on its Schedule K, the petitioner's net income is found on Schedule K of its 2011 and 2012 tax returns.

[4] Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. Current liabilities are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).

[5] The director noted that two different versions of the petitioner's 2011 tax return were submitted. The record contains a letter from counsel for the petitioner, stating that a draft copy of an incomplete 2011 tax return was inadvertently submitted. On appeal, the petitioner submitted a copy of the IRS tax return transcript for 2011 which matches the claimed final copy of the tax return which is also in the record.

2011 as listed in the petitioner's table amounts to and that the 2011 Forms W-2 in the record demonstrate that the petitioner paid its sponsored workers Therefore, the petitioner must demonstrate that it had the ability to pay the difference between the proffered wages and the wages paid for 2011, which amounts to

The petitioner submitted a table demonstrating wages paid to its sponsored workers for 2012 and 2013.[8] However, the record does not contain the petitioner's 2013 tax return or any evidence to support the total wages paid to the petitioner's sponsored workers in 2012. The record includes the petitioner's Form 941, Quarterly Tax Return, for the second quarter of 2013 and the petitioner's California state wage report for April through June 2013. However, the state wage report does not document wages paid to each individual claimed on the petitioner's table. Although the petitioner also submitted Forms 941 and state wage reports for 2004 to 2011, no quarterly tax returns or state wage reports were submitted for 2012.

The record does not contain the 2012 Forms W-2 or other evidence demonstrating wages paid to these workers in this year. In response to the director's NOID, counsel for the petitioner indicates that the petitioner paid actual wages to its sponsored workers of in 2012. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

We note that the petitioner's 2012 tax return states salaries and wages of which differs significantly from the amount of wages paid cited by counsel. Further, the petitioner's 2011 Forms 941 demonstrate that the petitioner reported a total of in wages in 2011. This is also inconsistent with the petitioner's 2011 tax return which lists salaries and wages of

Therefore, for 2011 and 2012 the petitioner did not have sufficient net income or net current assets to pay the difference between the proffered wages and wages paid of its other sponsored workers to demonstrate its ability to pay the instant beneficiary's proffered wage.

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[6] We note that the table for wages paid in 2011 states that the petitions for two of the sponsored workers, receipt numbers and have been terminated. No evidence in the record demonstrates that these petitions have been withdrawn. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, we have included the proffered wages for these sponsored workers in the above analysis.

[7] The petitioner has demonstrated that it paid some of its sponsored beneficiaries more than the proffered wage. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The record includes no evidence that the amount paid above the proffered wage to some beneficiaries would have been available to pay others that were paid below the proffered wage. Therefore, the actual difference between the proffered wages and the wages paid in 2011 may be higher.

[8] The petitioner requests that USCIS prorate the wages owed to each beneficiary for the portion of the year that occurred after the August 17, 2011 priority date. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The petitioner also asserts that it is the successor-in-interest to If the petitioner assumed the immigration related liabilities of then it is not clear that all of those remaining sponsored workers transferred to the petitioner have been accounted for in the petitioner's chart submitted in response to the director's NOID. Any sponsored workers and transferred workers from any intervening entity may also need to be accounted for in the petitioner's ability to pay the proffered wage if part of the full successorship chain.[9] In any further filings, the petitioner should fully address all sponsored beneficiaries and provide all pertinent tax returns and financial information, including tax transcripts for 2012 and 2013.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[9] USCIS has not issued regulations governing successors-in-interest. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986.